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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 DAQUAWYA L. FINLEY,

10 Plaintiff,

11 v.

12 GABRIEL HOLOSZYC-PIMENTEL, *et al.*

13 Defendants.  
14

Case No. C17-1760 RSM

ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS AND DENYING  
PLAINTIFF'S CROSS MOTION FOR  
JUDICIAL REVIEW OF U.S.  
ATTORNEY'S CERTIFICATION

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16 **I. INTRODUCTION**

17 This matter comes before the Court on Defendants' Motion to Dismiss under Federal  
18 Rule of Civil Procedure 12(b)(1) and Plaintiff's Cross-Motion for an Evidentiary Hearing.  
19 Dkts. #8 and #11. Defendants move to dismiss for lack of subject matter jurisdiction on the  
20 basis that Plaintiff, Daquawya L. Finley, failed to exhaust her administrative remedies as  
21 required by the Federal Tort Claims Act ("FTCA"). Dkt. #8 at 1 and 3. Plaintiff opposes the  
22 motion, arguing that Defendants' motion is improper because the statutory requirements of  
23 the FTCA do not apply to this case. Dkt. #11 at 3-4. Plaintiff asserts that the certification by  
24 Assistant United States Attorney (AUSA) Christina Fogg that Sergeant First Class (SFC)  
25 Gabriel Holoszyc-Pimentel was acting within the scope of his employment is not supported  
26 by sufficient evidence, and therefore the United States cannot be substituted as Defendant  
27 and the FTCA does not apply. *Id.* By way of cross-motion, Plaintiff also moves this Court to  
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1 grant an evidentiary hearing and discovery in order to support her challenge to the validity of  
2 the certification, prior to the Court's decision regarding Defendants' motion to dismiss. *Id.* at  
3 5-7. For the reasons set forth below, Plaintiff's cross-motion for an evidentiary hearing is  
4 DENIED, and Defendants' motion to dismiss is GRANTED.

## 6 II. BACKGROUND

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8 On October 19, 2014, Plaintiff was driving her car in Seattle, Washington, when she  
9 was involved in a motor vehicle accident allegedly caused by SFC Gabriel Holoszy-Pimentel,  
10 resulting in injury. Dkt. #6 at ¶¶ 4.1 and 4.2. The accident occurred at roughly  
11 9:58 a.m., when SFC Holoszy-Pimentel's vehicle struck Plaintiff's vehicle from the rear as  
12 both were traveling northbound on Westlake Avenue North. Dkt. #12, Ex. 3 at 1-2.  
13 Defendants do not dispute that an accident occurred, but instead maintain that at the time of  
14 the accident, SFC Holoszy-Pimentel was in Seattle attending a training associated with his  
15 employment in the United States Army, and therefore the United States is the proper  
16 Defendant in this action. Dkt. #16, Ex. A at 2.

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19 Gabriel Holoszy-Pimentel is a member of the United States Army and, prior to  
20 October 2014, was assigned to a permanent duty station at Joint Base Lewis-McCord in  
21 Washington State. Dkt. #17 at ¶ 3. Beginning on October 2, 2014, SFC Holoszy-Pimentel  
22 was issued temporary duty orders (TDY)<sup>1</sup> for a period of 31 days in order to attend a  
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26 <sup>1</sup> The October 2014 Joint Travel Regulations for uniformed service members, issued by  
27 the United States Department of Defense, define temporary duty orders as "duty at one or  
28 more locations, away from the [permanent duty station]," including travel to, or from, a  
29 course of instruction, for a duration of less than 140 days. U.S. DEP'T. OF DEF., JOINT  
30 TRAVEL REGULATIONS §§ Ch. 2, Pt. C, 2240(A)(1)(a), Ch. 4, Pt. D, 4410(A)(1), and App.  
A, Pt. 1 at 42 (October 2014) available at  
[http://www.defensetravel.dod.mil/site/pdcFiles.cfm?dir=/Travel\\_Regulations](http://www.defensetravel.dod.mil/site/pdcFiles.cfm?dir=/Travel_Regulations). While on  
TDY, uniformed service members are in "travel status" for "the elapsed period of time from

1 required training known as “Advanced Special Operations Techniques Course” (ASOTC) in  
2 connection with his role as a Communications Sergeant. Dkt. #17 at ¶¶ 3 and 4.

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4 According to SFC Holoszyc-Pimentel’s former commanding officer Captain John  
5 Griffin, ten days of that training would take place in Seattle, WA. Dkt. #17 at ¶ 5. Captain  
6 Griffin describes ASOTC training as intended to teach force protection measures and utilize  
7 real-life urban settings to train soldiers on driving tactics, with the Seattle segment focusing  
8 on driving from “training point to training point within Seattle in order to practice urban  
9 driving techniques.” *Id.* It was while attending the training in Seattle on TDY that SFC  
10 Holoszyc-Pimentel asserts the accident occurred. Dkt. #16, Ex. A at 2.

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13 On or about October 11, 2017, Plaintiff filed her civil Complaint in King County  
14 District Court against SFC Gabriel Holoszyc-Pimentel, “Jane Doe” Svaren, and EAN  
15 Holdings, LLC, seeking damages arising from the October 19, 2014, car accident. Dkt. #6.  
16 SFC Holoszyc-Pimentel received notice of the suit, and along with his commanding officer,  
17 Captain Alexander Dagg, submitted written statements to the United States Attorney for the  
18 Western District of Washington that SFC Holoszyc-Pimentel was acting within the scope of  
19 his official duties at the time of the accident. Dkts. #12, Ex. 4 and #16, Ex. A at 2. A  
20 representative of the United States Attorney’s Office reviewed the attestations and completed  
21 a certification of scope of employment. Dkt. #1. Defendants then removed the matter to this  
22 Court pursuant to 28 U.S.C. §§ 1442(a)(1) and 2679(d)(1) and (2), and on November 21,  
23 2017, the United States filed a notice of substitution, seeking to substitute itself as  
24 Defendant. Dkts. #1 and #2. The instant motions followed.

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30 the beginning to the end of official travel in compliance with the authority in an order.” *Id.* at  
§§ Ch. 2, Pt. D, 2250(C) and App. A, Pt. 1 at 47.

### III. DISCUSSION

#### A. Legal Standards

Federal Rule of Civil Procedure 12(b)(1) allows a party to move for dismissal based on a lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). When a court lacks subject matter jurisdiction, it lacks the power to proceed, and its only remaining function is to dismiss. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S. Ct. 1003, 1012, 140 L. Ed. 2d 210 (1998).

Under the Federal Employees Liability Reform and Tort Compensation Act of 1988 (hereinafter “the Westfall Act”), district courts are granted jurisdiction over civil claims filed against federal employees, including members of the United States Military. 28 U.S.C. §§ 1442(a), 2679(d)(1) and (2). The Westfall Act allows for the Attorney General of the United States, or a delegate thereof<sup>2</sup>, to certify that a federal employee was “acting within the scope of his office or employment at the time of the incident out of which the claim arose....” 28 U.S.C. § 2679(d)(1).

“Upon the Attorney General’s [or a delegate thereof’s] certification, the employee is dismissed from the action, and the United States is substituted as defendant in place of the employee.” *Osborn v. Haley*, 549 U.S. 225, 229-30, 127 S. Ct. 881, 894, 166 L. Ed. 2d 819 (2007). “The litigation is thereafter governed by the Federal Tort Claims Act (FTCA)... [and] [i]f the action commenced in state court, the case is to be removed to a federal district

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<sup>2</sup> Delegates of the Attorney General of the United States include United States Attorneys and Assistant United States Attorneys under the direction of the Office of the Attorney General of the United States.

1 court, and the certification remains “conclusiv[e] ... for purposes of removal.” *Osborn*, 549  
2 U.S. at 230 (citing 28 U.S.C. § 2679(d)(2)).<sup>3</sup>

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4 The certification may, however, be subject to judicial review on the issue of whether  
5 the federal employee was acting within the “scope of employment,” and as such, whether the  
6 United States can be properly substituted as Defendant. *See Gutierrez de Martinez v.*  
7 *Lamagno*, 515 U.S. 417, 434, 115 S. Ct. 2227, 2236, 132 L. Ed. 2d 375 (1995) (finding that a  
8 certification on scope of employment may be subject to judicial review). As in the current  
9 case, a plaintiff has the right to challenge the appropriateness of the certification. *See*  
10 *Osborn*, 549 U.S. at 245-46 (explaining that “the Attorney General’s certification is ‘the first,  
11 but not the final word’ on whether the federal officer is immune from suit....Plaintiff may  
12 request judicial review of the...scope-of-employment certification”).

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16 Once a certification has been made, it serves as *prima facie* evidence that the federal  
17 employee was acting within the scope of their employment. *Pauly v. U.S. Dep’t of Agri.*, 348  
18 F.3d 1143, 1151 (9th Cir. 2003) (quoting *Billings v. United States*, 57 F.3d 797, 800 (9th Cir.  
19 1995)). The burden then shifts to Plaintiff of disproving the appropriateness of the  
20 certification by a preponderance of the evidence. *Id.*

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22 State law governs the scope-of-employment inquiry under the Westfall Act. *Id.*; *see*  
23 *also McLachlan v. Bell*, 261 F.3d 908, 911 (9th Cir. 2001). Because the accident occurred in  
24 Seattle, WA, Washington State law applies:  
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28 <sup>3</sup> Plaintiff asserts that the Court should either grant deference to the jurisdictional facts  
29 alleged by Plaintiff and remand to state court, or hold an evidentiary hearing. Dkt. #11 at 3.  
30 Under *Osborn*, once a certification of scope of employment has been issued by an Attorney  
General, or representative thereof, a district court is without discretion to remand to state  
court, even if it finds the certification to be unwarranted. 549 U.S. at 241-42.

1 Under Washington law, an employee acts within the scope of his  
2 employment, even if his acts are contrary to instructions or constitute  
3 intentional torts, when he is “engaged in the performance of the duties  
4 required of him by his contract of employment” or when “*he [is]  
engaged at the time in the furtherance of the employer's interest.*”  
5 *Dickinson v. Edwards*, 105 Wn.2d 457, 716 P.2d 814, 819 (1986).

6 *Pauly*, 348 F.3d at 1151 (emphasis added); Dkt. #6 at ¶¶ 3.1 and 3.2.

7 A significant number of cases defining and applying Washington State law on scope  
8 of employment focus on the language “engaged at the time in furtherance of the employer’s  
9 interest.” *See Vollendorff v. United States*, 951 F.2d 215, 219 (9th Cir. 1991); *Dickinson v.*  
10 *Edwards*, 105 Wn.2d 457, 467, 716 P.2d 814, 819 (1986); *Elder v. Cisco Constr. Co.*, 52  
11 Wn.2d 241, 245, 324 P.2d 1082 (1958); *Melin-Schilling v. Imm*, 149 Wn. App. 588, 591–92,  
12 205 P.3d 905, 907 (2009). The court in *Dickinson* explicitly noted that the presence of a  
13 benefit to the employer is of particular emphasis in evaluating whether an employee was  
14 acting within the scope of employment. *See Dickinson*, 105 Wn.2d at 467. In assessing  
15 benefit to the employer, many of those same courts have relied on a similar test found in the  
16 Restatement (Second) of Agency § 228, which provides:  
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- 20 (1) Conduct of a servant is within the scope of employment if, but only  
21 if:  
22 (a) it is of the kind he is employed to perform;  
23 (b) it occurs substantially within the authorized time and space  
24 limits;  
25 (c) it is actuated, at least in part, by a purpose to serve the  
26 master, and  
27 (d) if force is intentionally used by the servant against another,  
28 the use of force is not unexpected by the master.  
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1 (2) Conduct of a servant is not within the scope of employment if it is  
2 different in kind from that authorized, far beyond the authorized  
3 time or space limits, or too little actuated by a purpose to save the  
4 master.

5 *See Melin-Schilling*, 149 Wn. App. at 591.

6 **B. Scope of Employment Analysis**

7 In order to fully address both Defendants' motion and Plaintiff's cross-motion, the  
8 Court must determine: 1) whether the certification was appropriate, 2) whether an  
9 evidentiary hearing is necessary, and 3) whether the Court lacks subject matter jurisdiction.  
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11 As noted above, when an Assistant United States Attorney issues a certification of  
12 scope of employment, it serves as *prima facie* evidence that the federal employee was acting  
13 within the scope of his or her employment. *Pauly*, 348 F.3d at 1151. The burden then shifts  
14 to Plaintiff to disprove the appropriateness of that certification by a preponderance of the  
15 evidence. *Id.* In this case, the Court finds that Plaintiff has not met her burden.  
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17 Here, the record demonstrates that SFC Holoszyc-Pimentel was acting within the  
18 scope of his employment at the time of the accident. The key component in assessing scope  
19 of employment is whether the employee was acting for the benefit of their employer. *See*  
20 *Melin-Schilling*, 149 Wn. App. at 591. Thus, the Court should examine whether: (1) the  
21 activity is the kind the person is employed to perform, (2) the activity occurred within work  
22 hours or approved spaces, and (3) the activity was actuated, at least in part, by a purpose to  
23 serve the employer. *See* Restatement (Second) of Agency § 228; *see also Vollendorff*, 951  
24 F.2d at 219; *Melin-Schilling*, 149 Wn. App. at 591.  
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26 In this case, the activity was one SFC Holoszyc-Pimentel was employed to perform.  
27 SFC Holoszyc-Pimentel is a Communications Sergeant in the United States Army, and he  
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1 was placed by his commanding officers on TDY to attend and participate in ASOTC training  
2 in Seattle on the date of the accident. Dkt. #17 at ¶¶ 3, 4, and 5. The purpose of that training  
3 was for SFC Holoszyc-Pimentel to learn urban-driving skills by driving from point to point  
4 in Seattle, as part of the larger training program he was participating in. *Id.* As SFC  
5 Holoszyc-Pimentel was ordered to Seattle to attend training that consisted of driving  
6 throughout the city based on his role as a Communications Sergeant, his activity was the kind  
7 he was employed to perform and satisfies the first factor. *Id.*

10           Second, the activity in this case occurred within work hours and approved spaces.  
11 SFC Holoszyc-Pimentel was given TDY to attend the training, and as such was placed on  
12 “travel status” from the moment he left Joint Base Lewis-McCord. *Id.* His “travel status” was  
13 maintained throughout the 10-day Seattle training, placing him effectively at work for the  
14 duration of that time. *Id.* Accordingly, SFC Holoszyc-Pimentel was within the city of Seattle  
15 on TDY and under a continuous “travel status” that placed him within an approved area at  
16 the time of the accident. This satisfies the second factor.

19           Finally, the activity was actuated by a purpose to benefit his employer. The purpose  
20 of attending the 10-day Seattle Segment of the ASOTC was to learn urban-driving techniques  
21 in order to “teach force protection measures and utiliz[e] real-life urban settings to train  
22 soldiers on driving tactics.” Dkt. #17 at ¶ 5. At the time of the accident, SFC Holoszyc-  
23 Pimentel was participating in training he had been ordered to attend due to his commanding  
24 officer’s desire that he learn those skills as a Communications Sergeant. *Id.* at ¶ 3. This meets  
25 the third factor, as SFC Holoszyc-Pimentel’s only indicated motivation for being at the scene  
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1 of the accident was to participate in a training he was assigned to be the United States Army  
2 as part of their desired training programs.<sup>4</sup>

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4 Other courts have found a defendant to be acting in the scope of employment in  
5 similar situations. *See Vollendorff*, 951 F.2d at 218-20 (finding that Army Officer leaving  
6 open medication bottle on kitchen counter within reach of infant grandchild was within his  
7 scope of employment, as United States Army required him to take prescribed medication, at  
8 home, in order to remain ready for active military service); *Melin-Schilling*, 149 Wn. App. at  
9 591-594 (finding car accident involving school maintenance worker was within scope of  
10 employment as it occurred on approved coffee break, leaving location approved of by  
11 employer, during legally mandated break time).

14 Plaintiff argues that SFC Holoszyc-Pimentel was not acting within the scope of his  
15 employment based on three observations. The first is that the accident took place at 9:48 a.m.  
16 Dkt. #11 at 6. Plaintiff speculates that if SFC Holoszyc-Pimentel was in Seattle to attend  
17 training, the training would likely have begun much earlier in the day. *Id.* Second, Plaintiff  
18 notes that the accident took place at Galer Street and Westlake Avenue North, which is north  
19 of the city center. *Id.* and Dkt. #12, Ex. 5. Plaintiff suggests that any training would likely  
20 occur within the city center, so it is unlikely SFC Holoszyc-Pimentel was attending training  
21 at the time. Dkt. #11 at 6.

25 Finally, Plaintiff contends that if SFC Holoszyc-Pimentel was actually attending  
26 training in Seattle as he claims, he would not have been traveling north, away from the city  
27 center, at the time of the accident. *Id.* Plaintiff proposes that by traveling north away from the

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30 <sup>4</sup> The Court did not consider the Declaration of Captain Alexander Dagg because it  
was not signed, and therefore not an admissible declaration. 28 U.S.C. § 1746.

1 city center and at a time later than when a training would likely take place, SFC Holoszyc-  
2 Pimentel was not participating in the training but instead engaging in a personal errand  
3 unconnected with his employment. Dkt. #19 at 2.  
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5 Plaintiff concludes that SFC Holoszyc-Pimentel must have been on a “lark” or  
6 “detour,” rather than working. *Id.* This theory is similar to that asserted in *Green v. Hall*. See  
7 8 F.3d 695, 699 (9th Cir. 1993) (examining the actions of an army reservist who was  
8 involved in an off-base car accident). In *Green*, two of the key facts on which the Ninth  
9 Circuit Court of Appeals focused were that the reservist was not on duty at the time of the  
10 accident, and that his employment did not involve obtaining off-base food. *Green*, 8 F.3d at  
11 699. The *Green* court found that the reservist was on an unapproved personal errand, outside  
12 of approved time and place, and therefore was not acting for the benefit of his employer. *Id.*  
13 That opinion is in accord with the general rule that personal activities, or trips to and from  
14 work, like the “lark” or “detour” as suggested by Plaintiff, are not for the benefit of the  
15 employer and not within scope of employment. See *Dickinson*, 105 Wn.2d at 467-48.  
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20 However, the circumstances of this case are easily distinguished. Here, SFC  
21 Holoszyc-Pimentel was on TDY and was in “travel status” for the 31-day period of those  
22 orders, and for the entire duration of his time in Seattle. Dkt. #17 at ¶¶ 3 and 4. SFC  
23 Holoszyc-Pimentel was not going to or from work, nor on a personal errand, as suggested by  
24 Plaintiff. The entire purpose of SFC Holoszyc-Pimentel’s presence in Seattle at the time of  
25 the accident was his having been ordered to attend training there; training that involved him  
26 driving the streets of Seattle on October 19, 2014. Nothing asserted by Plaintiff suggests  
27 otherwise. Accordingly, Plaintiff has not provided sufficient evidence to refute that SFC  
28 Holoszyc-Pimentel was acting in the scope of his employment at the time of the accident.  
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1           **C. Plaintiff's Request for an Evidentiary Hearing or Discovery**

2           Plaintiff argues that an evidentiary hearing is necessary to gather the evidence she  
3 needs to meet her burden. The Ninth Circuit favors evidentiary hearings, where necessary, to  
4 resolve issues of disputed facts in Westfall Act cases. *See Arthur v. U.S. By & Through*  
5 *Veterans Admin.*, 45 F.3d 292, 296 (9th Cir. 1995). In deciding whether an evidentiary  
6 hearing is necessary, the district court evaluates whether Plaintiff has alleged sufficient facts  
7 that, taken as true, prove SFC Holoszyc-Pimentel was acting outside the scope of  
8 employment. *See Saleh v. Bush*, 848 F.3d 880, 889 (9th Cir. 2017). Because “[n]ot every  
9 complaint will warrant further inquiry into the scope-of-employment issue,” Plaintiff must  
10 allege sufficient facts to rebut the certification in order to receive discovery or an evidentiary  
11 hearing. *Stokes v. Cross*, 327 F.3d 1210, 1214-16 (D.C. Cir. 2003). This Court is tasked with  
12 assessing the documentary evidence on record and construing the allegations in Plaintiff's  
13 Complaint liberally under Federal Rule of Civil Procedure 8(a). *See Wuterich v. Murtha*, 562  
14 F.3d 375, 383 (D.C. Cir. 2009); *see also* Fed. R. Civ. P. 8(a)(2).

15           The entirety of Plaintiff's factual allegations are:

16           4.1 On or about October 19, 2014, Plaintiff Daquawya L. Finley was  
17 driving her vehicle Northbound on Westlake Avenue North, followed  
18 by Defendant Gabriel Holoszyc-Pimentel in his vehicle.

19           4.2 As Plaintiff was moving along Northbound on Westlake Avenue  
20 North toward Galer Street, Defendant Gabriel Holoszyc-Pimentel struck  
21 Plaintiff's vehicle from behind.

22           Dkt. #6 at ¶¶ 4.1 and 4.2.

23           Plaintiff then speculates that the circumstances surrounding the accident suggest  
24 alternative activities and motivations for SFC Holoszyc-Pimentel's presence other than his  
25 participation in the training program. Dkts. #11 and #19. For example, Plaintiff suggests that  
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1 because the accident occurred at 9:58 a.m., on a street outside the city center, where both  
2 parties were moving away from the city center, it is unlikely that SFC Holoszyc-Pimentel  
3 was actively engaged in any training program at all. *Id.* at ¶ 17. To support her factual theory  
4 of the case, Plaintiff has attached exhibits including the police report of the accident, a screen  
5 shot of the accident location in regards to the city of Seattle, and a screenshot of the cross-  
6 streets where the accident occurred. Dkt. #12, Ex. 3-5.

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9 The facts alleged in the Complaint are generally undisputed between the parties. Both  
10 agree that on October 19, 2014, Plaintiff and SFC Holoszyc-Pimentel were in Seattle, WA,  
11 traveling northbound on Westlake Avenue North, when an accident occurred around 9:58  
12 a.m. Dkts. #8 at 2 and #11 at 6. Taken as true, this would establish that SFC Holoszyc-  
13 Pimentel was driving within the city of Seattle on October 19, 2014. That comports with  
14 AUSA Christina Fogg's certification that SFC Holoszyc-Pimentel had employment duties on  
15 October 19, 2014, included attending an urban-driving training in Seattle, WA. Dkt. #17 at ¶  
16 ¶ 3 and 5.

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19 Courts that find evidentiary hearings necessary, frequently do so under two  
20 circumstances, (1) when a defendant has denied that the allegations in the complaint  
21 occurred, and (2) when the evidentiary record presented by both parties is sufficiently  
22 detailed and developed to warrant a hearing to assess the credibility of the evidence. *See*  
23 *Stokes*, 327 F.3d at 1216 (granting discovery where federal police officers denied Plaintiff's  
24 detailed allegations that they destroyed evidence and engaged in malicious criminal acts,  
25 activities inherently outside of scope of employment); *see also Loehndorf v. United States*,  
26 No. C14-0106JLR, 2014 WL 3752120, at \*4 (W.D. Wash. July 30, 2014) (granting  
27 evidentiary hearing where member of United States Navy denied Plaintiff's allegations and  
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1 provided substantial documentary evidence to rebut scope of employment challenge, and an  
2 assessment of credibility was necessary to resolve issue of fact).

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4 In contrast, courts that have denied evidentiary hearings often do so on the basis that  
5 Plaintiff's Complaint alleged facts when, even taken as true, were of a nature that they would  
6 not establish behavior outside the scope of employment. *See Saleh*, 848 F.3d at 892 (holding  
7 that because the alleged plans and motivations of government officials regarding Iraq War,  
8 taken as true, were of a nature that would be considered part of scope of employment, an  
9 "evidentiary hearing would be a futile exercise"); *see also Wuterich*, 562 F.3d at 381 (finding  
10 Plaintiff's allegations regarding United States Congressman's statements to media, taken as  
11 true, would fail to establish that he was acting outside scope of employment).

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14 Plaintiff has not alleged any facts supporting her suggestion that SFC Holoszyc-  
15 Pimentel was acting in a manner not permitted or associated with his attendance at the  
16 Seattle training. SFC Holoszyc-Pimentel was in Seattle on continuous orders and travel  
17 status for the duration of his time here, for which he was not only participating in urban-  
18 driving activities, but was also permitted to travel to and from that training. Dkt. #17 at ¶¶ 3  
19 and 5. Accordingly, the Court denies Plaintiff's cross-motion for an evidentiary hearing and  
20 discovery.  
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#### 23 **D. Motion to Dismiss for Lack of Subject Matter Jurisdiction**

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25 Having determined that the Court accepts the United States' certification that SFC  
26 Holoszyc-Pimentel was acting in the scope of his employment and having denied an  
27 evidentiary hearing, the Court may now resolve Defendants' motion to dismiss. Before  
28 bringing an FTCA claim in this Court, Plaintiff must exhaust her administrative remedies.  
29 *See* 28 U.S.C. §§ 2675(a) and 2679(d). In order to exhaust her administrative remedies,  
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1 Plaintiff must either: 1) receive a denial of her claim from the appropriate administrative  
2 agency in writing, or 2) have been waiting for a disposition for at least six months, upon  
3 which time a failure to reply will amount to a constructive denial of the claim. 28 U.S.C. §  
4 2675(a).

6 Defendants assert that Plaintiff has failed to exhaust her administrative remedies as  
7 required by the FTCA. Dkt. #8 at 4-6. Plaintiff filed an administrative claim on December 4,  
8 2017. Dkt. #9 at ¶ 2. Plaintiff has not provided evidence of a denial of that claim from the  
9 United States Army, and six months has not yet elapsed since the submission of her claim.  
10 As such, Plaintiff has failed to exhaust her administrative remedies as required by the FTCA,  
11 and the Court lacks jurisdiction over her claims. *See Steel Co.*, 523 U.S. at 94. The Court  
12 grants Defendants' 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.  
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#### 15 IV. CONCLUSION

16 Having reviewed the relevant pleadings, the Declarations and Exhibits attached  
17 thereto, and the remainder of the record, the Court hereby ORDERS:  
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19 1. Plaintiff's Cross-Motion for Judicial Review of the United States Attorney's  
20 Certification (Dkt. #11) is DENIED. The Clerk SHALL substitute the United  
21 States as the only Defendant in this action and shall terminate Gabriel Holoszyc-  
22 Pimentel, Jane Doe Svaren, and EAN Holdings, LLC, as Defendants in this  
23 matter.  
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25 2. Defendants' Motion to Dismiss (Dkt. #8) is GRANTED.  
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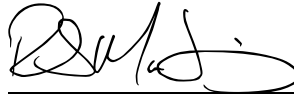
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1                   3. This matter is now CLOSED.  
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4                   DATED this 8<sup>th</sup> day of February 2018.  
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8                   RICARDO S. MARTINEZ  
9                   CHIEF UNITED STATES DISTRICT JUDGE  
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